



STATE OF WASHINGTON
OFFICE OF FINANCIAL MANAGEMENT

Insurance Building, PO Box 43113 • Olympia, Washington 98504-3113 • (360) 902-0555

June 12, 2013

TO: Agency Directors
Statewide Elected Officials
Presidents of Higher Education Institutions
Boards and Commissions

FROM: David Schumacher
Director

**SUBJECT: CONTINGENCY PLANNING FOR STATE AGENCY OPERATIONS ON
JULY 1**

Although we expect that the 2013-15 operating and capital budgets will be enacted prior to June 30, we need to implement contingency planning in the event the Legislature fails to make appropriations by July 1, 2013.

The Governor and the Office of Financial Management (OFM) have been consulting with the Office of the Attorney General for legal guidance. The state constitution prohibits payment of treasury funds without an appropriation; however, certain constitutional mandates and federal law are in conflict with this prohibition and we believe may take precedence. (See attached.)

To assist with identifying activities that may be authorized in the absence of appropriations, I am asking that agencies specify services that fall into the following categories:

1. Services funded by appropriations in the enacted transportation budget (ESSB 5024).
2. Services that do not require an appropriation, e.g., from non-appropriated funds.
3. Services to continue based on certain constitutional mandates and federal law. (Please consult with your assigned assistant attorney general for clarification. The existence of a state statute or federal grant is not, by itself, a sufficient mandate for this purpose.)
4. Many important programs and services will cease absent timely legislative appropriations. Therefore, in addition to the categories above, I am also asking that agencies identify services that are necessary for the immediate response to issues of public safety, or to avoid catastrophic loss of state property.

Please submit your categorized list of services to OFM (attention: David Schumacher) by the close of business on Monday, June 17. Descriptions of the services also should be accompanied by an approximation of how many staff would be necessary to carry out these operations, including the minimum level of support staff that would be essential to continuing services under categories 3 and 4 above. If you have questions of a legal nature to complete your list, please consult the assistant attorney general assigned to your agency.

June 12, 2013

Page 2 of 2

After review, OFM will distribute a list of those activities expected to continue on July 1 should an operating/capital budget not be enacted. In the meantime, agencies also should consider what administrative procedures are necessary to achieve the continuation of authorized activities and for the cessation of services not authorized. If you are certain that specific activities cannot continue without an appropriation, you can proceed with notifying appropriate parties. However, to the extent you question whether an activity can continue, please refrain from issuing notices until OFM's review is complete.

We intend, to the best of our ability, to honor the provisions of our contracts and agreements, including our collective bargaining agreements. OFM's Labor Relations Division will be coordinating discussion with unions and agencies to meet our collective bargaining obligations. Questions in this area should be directed to your agency's assigned Labor Relations Division negotiator.

Should it become necessary, OFM will provide additional guidance and seek additional information from agencies on issues involved in the continuation and cessation of services. Please provide OFM with the name of a contact person for your agency should OFM staff have questions. We assume that, in most cases, the contact will be the deputy director for the agency unless stated otherwise.

While we consider it unlikely that these plans will need to be implemented, we believe it prudent to have a worst-case scenario strategy in place.

Thank you for your assistance.

cc: Bryon Moore
Richard Ramsey
Charlie Gavigan
Dave Johnson

Legal Constraints on Governmental Operations Absent Appropriations

I. Background Legal Provisions

The Legislature controls appropriations. Article 8, Section 4 of the state constitution provides:

No moneys shall ever be paid out of the treasury of this state, or any of its funds, or any of the funds under its management, except in pursuance of an appropriation by law.

State law further constrains state officers and employees from incurring obligations against appropriated funds. RCW 43.88.130 states:

No agency shall expend or contract to expend any money or incur any liability in excess of the amounts appropriated for that purpose.

RCW 43.88.290 further provides that:

No state officer or employee shall intentionally or negligently: Over-expend or over-encumber any appropriation made by law; fail to properly account for any expenditures by fund, program, or fiscal period; or expend funds contrary to the terms, limits, or conditions of any appropriation made by law.

The Attorney General's Office opined in 1977 that agencies operating from funds subject to appropriation could not expend such funds or incur liabilities, stating:

... The basic consequences of a failure by the legislature to have adopted a biennial budget ... is quite simple; namely, no expenditures may be made for salaries or anything else, and no obligations to make such payments may be incurred by any state agency ... including the legislature

The constitutional and statutory restrictions only apply to funds that require an appropriation.

II. Constitutional Obligations

The federal and state constitutions establish legal obligations concurrent with the prohibition against expenditures in the absence of appropriations. The Governor intends to keep this very narrow band of legally mandated activities operational in the absence of an operating budget.

a. **Care & Custody.** When the State takes a person involuntarily into its legal care and custody, the U.S. Constitution imposes upon it a corresponding duty to assume some responsibility for his safety and general well-being. The emphasis of the case law in this area is that the person is involuntarily in the physical custody of the state or the

state is the person's legal guardian. Consequently, those persons residing in the state's prisons, state hospitals, juvenile rehabilitation services, and the secure commitment center, and children in foster care have a constitutional right to certain services.

The state also has obligations to preserve services to children, the mentally ill or developmentally disabled in our care and custody where the state has assumed legal responsibility for their welfare, but reside outside an institution (such as a group home or other facility).

b. Education. Expenditures for K-12 education may also be included in this narrow band of legally required activities. Given the state Supreme Court's continuing jurisdiction in *McCleary v. State*, the failure to appropriate any funds for basic education may call the question of what remedies the Court may entertain to enforce the constitutional obligation.

III. Federal Mandates

The Supremacy Clause of the U.S. Constitution states that the laws of the United States shall be the supreme law of the land. Consequently, in those instances where federal law places an obligation on the state to promptly make payments of public funds, the federal requirement could prevail over the state appropriation requirement. Agencies need to determine which federal programs under federal law may require the continuation of funding.

To the extent that RCW 43.88.130 and 43.88.290 place the receipt of federal funds in jeopardy, RCW 43.88.220 provides state agencies with authority to continue to incur financial liabilities. However, most federal funds are deposited into the general fund in the state treasury, and thus, are subject to the appropriation requirements of Article 8, Section 4. Therefore, in some instances, services paid with federal funds may continue, but payment for those services will be delayed until appropriations are enacted.

IV. Contracts

Many state agencies have contractual agreements for goods and services that will be impacted if no operating or capital appropriations acts are enacted. It is a standard practice of state agencies to include provisions which state that continuation of contracts are contingent on funding and/or may be reduced to funds appropriated to the agency. Consequently, most agencies can avoid the need to expend funds by exercising such contractual provisions.

Agencies should not assume that contracts and agreements with the federal government, vendors, providers, etc. must continue due to an unlawful impairment of contract. More likely is that the lack of funds may place the agency in breach of contract. This is simply a consequence of legislative inaction. We should acknowledge that agencies, and ultimately the taxpayer, may pay a price in the form of interest payments and/or damages.